

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

THE ANTIOCH COMPANY :
LITIGATION TRUST, :
 :
Plaintiff, : CASE NO. 3:10-cv-00156
 :
vs. : (Judge Timothy S. Black)
 :
LEE MORGAN, et al., :
 :
Defendants. :
 - - -

VOLUME I

Deposition of MARK A. GREENBERG, a
witness herein, taken as upon cross-examination by
the Defendants pursuant to the Ohio Rules of Civil
Procedure, before me, Kelly Green, RPR, a Notary
Public within and for the State of Ohio, at Taft,
Stettinius & Hollister, 425 Walnut Street, Suite
1800, Cincinnati, Ohio, on Monday, August 26,
2013, at 9:08 a.m.

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1 competitors in the 2003 to 2008 time frame in
2 regard to their financial performance?

3 A. I did not.

4 Q. In preparing your report and formulating
5 your opinion, sir, did you take into account the
6 -- whether the Internet had any effect on Creative
7 Memories' product lines and marketing model?

8 A. I specifically mentioned that that was
9 one of the -- one of the -- one of the impacts
10 that they were -- they were experiencing, so...

11 Q. Any other market developments that you
12 considered in formulating your report or in
13 preparing your opinions that affected Creative
14 Memories' financial performance between 2003 and
15 2008?

16 A. I'm not really sure what your question
17 is.

18 Q. Okay. Other than the growth of the
19 Internet during that period, did you consider any
20 other market developments that impacted Creative
21 Memories' sales between 2003 and 2008?

22 A. The only things that were considered
23 were the statements made by the defendants and
24 references that were in various exhibits by the

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1 investment bankers, in particular, but also the
2 evaluators in respect to retail competition,
3 Internet competition, and digital competition in
4 general.

5 Q. Did you make any effort in preparing
6 your report or formulating your opinions to
7 determine how those market forces impacted the
8 scrapbooking and memory preservation industry
9 generally?

10 A. No.

11 Q. Did you review any treatises or
12 scholarship on the effect of those market forces
13 on scrapbooking or memory preservation?

14 A. I did not.

15 Q. Did you, in preparing your report or
16 formulating your opinions, consider the effect of
17 the emerging photo sharing technologies on
18 Creative Memories' core business of scrapbooking?

19 A. I did not.

20 Q. What about online photo storage?

21 A. I did not.

22 Q. Did you consider competition -- the
23 increasing competition in the marketplace for
24 memory preservation that Creative Memories was

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1 facing from a company called Shutterfly?

2 A. Only to the extent that it was discussed
3 in the -- in the various exhibits and in
4 testimony.

5 Q. Didn't do any independent investigation
6 of that?

7 A. No.

8 Q. How about Snapfish; are you familiar
9 with --

10 A. I am. I am familiar with who they are
11 but only to the extent it was specifically
12 referred to in the -- in the documents.

13 Q. Did you take into account, in preparing
14 your report or formulating your opinions, the
15 effect that Google's Picasa Web Albums had on
16 Creative Memories' business?

17 A. I didn't. And I don't recall
18 specifically that being referred to, although it
19 may have been.

20 Q. How about the effect that a product like
21 Flickr -- Internet-based product like Flickr had
22 on Creative Memories' scrapbooking business
23 between 2003 and 2008?

24 A. Same answer as last. Only to the extent

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1 it was in there, but I don't recall that it was.

2 Q. And if it was in there, did you just
3 note it was in the deposition transcripts, or did
4 you actually --

5 A. I noted --

6 Q. -- factor --

7 A. Just -- just noted that that was there.
8 Sorry.

9 Q. Did you actually factor it into
10 formulating your opinions and in your report?
11 Because I didn't see any reference to any of that
12 in your report.

13 A. I did not concern myself specifically
14 with those issues except to note that they were
15 there, and they were creating competitive pressure
16 for the company.

17 Q. So when you say "those issues," you're
18 talking about the increasing capability to store
19 photos on the Internet and to share photos on the
20 Internet and the emergence of companies like
21 Shutterfly and products like Google's Picasa Web
22 Albums?

23 A. To the -- let me be careful how I want
24 to answer this. The -- the impact of the various

21 (Pages 78 to 81)

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1 other media technology and channels were certainly
 2 noted and understood to be impactful in my -- in
 3 my point of view about the business. But they --
 4 but beyond that, did I go and look at some
 5 economic data in those -- in those respects? No.
 6 The only things that I did review were the -- were
 7 the information that was available through a
 8 variety of sources inside those documents.

9 Q. Did you do any independent investigation
 10 in preparing your report or formulating your
 11 opinions as to the marketshare that any of the
 12 emerging Internet-based companies or retail
 13 outlets took from Creative Memories in regard to
 14 memory preservation products and scrapbooking?

15 A. No.

16 Q. In preparing your report and formulating
 17 your opinions, did you take into account the
 18 emergence of Facebook as a photography storage and
 19 sharing product?

20 A. No.

21 Q. Did you make any effort to determine the
 22 marketshare of memory preservation and photo
 23 sharing of that market that Facebook took from
 24 Creative Memories?

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1 A. No.

2 Q. In formulating your opinions and
 3 preparing your report, did you consider any other
 4 companies that ran into some trouble in the
 5 marketplace as a result of online photo and
 6 digital storage such as Eastman Kodak?

7 A. Well, the "such as" I certainly didn't
 8 recall, but the -- only to the extent there were
 9 discussions by some of the private equity funds
 10 who had -- had done some research or had positions
 11 in companies like that, if I recall, of some of
 12 the impact and some of the -- some of the -- just
 13 what the economic conditions of those companies
 14 were.

15 Q. And what were the economic conditions of
 16 those companies?

17 A. Some of those were struggling.

18 Q. Do you recall which specific companies?

19 A. I don't offhand.

20 Q. Do you recall which -- what sources you
 21 were looking at that you just referred to in terms
 22 of investment bankers and others?

23 A. What I recall is that it showed up in a
 24 bulleted document probably from Houlihan on the

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1 response from -- from one or -- you know, or maybe
 2 more than one of the private equity funds.

3 Q. Do you remember which private equity
 4 funds?

5 A. I don't offhand.

6 Q. Have you ever published any articles on
 7 corporate governance?

8 A. No.

9 Q. Ever teach a course on corporate
 10 governance?

11 A. No.

12 Q. Did you review any scholarship or
 13 treatises on corporate governance in preparing
 14 your report or formulating your opinions?

15 A. Not specifically for this process, no.

16 Q. Have you ever advised a corporate
 17 director about corporate governance issues?

18 A. Yes.

19 Q. And can you tell me your general
 20 experience there in giving such advice?

21 A. Well, it's fairly ongoing. In fact, I
 22 have a client in the hospitality business with
 23 a -- with a company that I did a fairly large
 24 restructuring for in 2011. And the CEO's on the

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1 board and I'm an advisor to the board and -- you
 2 know, infrequently but not -- not terribly, but --
 3 but I do advise him on governance issues.

4 Their company's just been bought by --
 5 at least the debt's been bought out by a -- by a
 6 -- by a PE fund. And there's issues on -- in
 7 terms of indemnification, and they're looking at
 8 doing an Article 9. So yeah, sure.

9 Q. Well, describe for me the specific
 10 governance issues that you've given advice on in
 11 that one particular case you've just testified to.

12 A. The issues are really what is the
 13 responsibility of the board in terms -- it's a
 14 Delaware company and what the -- you know, what --
 15 what the -- how broad those -- those requirements
 16 are, and these are conversations I had with the
 17 CEO.

18 Q. What requirements?

19 A. In terms of what their obligations are
 20 in terms of total stakeholder -- with the
 21 stakeholders.

22 Q. And what I'm trying to get at is what is
 23 your advise to them about their obligations
 24 vis-a-vis stakeholders?

22 (Pages 82 to 85)

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1 A. In this company in particular, there are
2 -- there are vast divisions between the holders of
3 the equity and the debt in the company. The
4 company has gone -- underwent a very substantial
5 restructuring with a hedge fund as one of their
6 lenders.

7 The board is conflicted. They came in
8 -- the primary, at least, decorum for the board
9 came in from the -- from the lenders and the
10 inside board of directors, the CEO and chief
11 operating officer of the company.

12 And there's been a lot of conflicts as
13 to what to do and what happens in respect to, for
14 example, if they did an Article 9 sale and
15 whatever type of liability might exist for those
16 particular board members.

17 Q. Do you recall what advice you gave them
18 about dealing with conflicts?

19 A. I'm trying to think specifically. Not
20 specific. I mean, I -- you know, the advice has
21 been around what their obligations are with these
22 -- this particular person's obligation is for the
23 whole company and what the potential consequences
24 would be if there was, for example, successor

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1 liability or -- or there was the -- the shell left
2 -- was left over and they were still a fiduciary
3 to that shell.

4 Q. You referenced a person. Is this a
5 director or --

6 A. He's a director and he's a -- he's a CEO
7 and a director of the board.

8 Q. And what advice did you give him?

9 A. Just really -- just rounding out what --
10 you know, what I thought he needed to know about
11 what those things could be.

12 Q. And what did you think he needed to
13 know?

14 A. The questions he asked me was what
15 happens if they do an Article 9 and we -- and we
16 still have the C Corporation, the Delaware
17 corporation, and we have an Article 9 in a Newco,
18 and what's -- what happens if there is -- if
19 there's any type of lawsuit that occurs to the --
20 to the shell in which he's still fiduciary, and
21 basically just outlining what I think would be
22 generally the case.

23 Q. Did you provide him advice on how to
24 avoid a conflict situation?

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1 A. Not specifically, no.

2 Q. Okay. Did you provide only him advice,
3 or were you advising the entire board?

4 A. In various times, I've advised the
5 entire board but more on financial transaction
6 matters. This case -- this has been more on him
7 as a director than as a fiduciary.

8 Q. Did you provide any other governance
9 advice to that particular board?

10 A. Not -- not that I recall.

11 Q. Is there any other experience you have
12 in dispensing what you consider to be corporate
13 governance advice to a director or a manager or a
14 corporate board?

15 A. Not specifically. I've been on several
16 boards and advised several boards.

17 Q. I didn't ask you if you were on several
18 boards; I'm asking whether you recall other than
19 the instance you just described.

20 Do you recall, as an advisor, providing
21 a director, a board, or corporate manager advice
22 with regard to corporate governance issues?

23 A. I don't recall specifically.

24 Q. The one company and one situation you

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1 did provide advice in conjunction with an Article
2 9 sale, can you tell me who that company is?

3 A. I can. It's BridgeStreet Worldwide,
4 Incorporated.

5 Q. Who is the particular director that you
6 were principally advising?

7 A. His name is Sean Worker, W-O-R-K-E-R.

8 Q. Have you reviewed any scholarship or
9 treatises addressing the duties of an interested
10 director in a transaction under Delaware and
11 Minnesota law in preparing your report or in
12 formulating your opinions in this case?

13 A. No.

14 Q. Do you have any experience in advising
15 an officer or director of an Ohio corporation
16 about their -- about corporate governance matters?

17 A. I have a lot of clients. I'm trying to
18 think. Specifically governance matters, nothing
19 that I specifically recall.

20 Q. I note in your report at page 4 that
21 Silverstone provides, among many other services,
22 business valuations; is that -- is that right?

23 A. That's correct.

24 Q. How many valuations have you personally

23 (Pages 86 to 89)

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1 performed since 2008?

2 A. Oh, geez. We do five to ten a year.
3 I'm serious. It's about five to ten a year.

4 Q. Oh, no, I appreciate that. I only
5 laughed a little, which wouldn't be reflected on
6 the record, because that was going to be a follow-
7 up question, is how many -- how many times does
8 Silverstone perform business valuations per year,
9 and I think now the answer is five to ten.

10 Of those five to ten since 2008, how
11 many of those business valuations are you the lead
12 on, Mr. Greenberg?

13 A. Almost all of them.

14 Q. Well, when you say almost all of them,
15 can you give me an estimate?

16 A. I would actually say all of them. I
17 have somebody that works for me that will do the
18 detailed work of it, but I oversee it, and it's
19 based on the models that I've developed, and so...

20 Q. With regard to your business valuations,
21 have you ever valued a non-public S Corporation?

22 A. Oh, yeah.

23 Q. Can you give me any examples?

24 A. Yeah, I have -- I have a bunch. I'm

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1 trying -- let me think. Yeah, I did valuation
2 work for the Ryan Style Company. I've done
3 valuation work for an S Corp broker-dealership in
4 Cincinnati. I don't want to say who it is. I'm
5 under confidentiality.

6 I've done -- I've done a lot -- a lot of
7 my -- a lot of my clients are S Corps, so a fair
8 number of them. And I can't remember all of them,
9 but quite a few.

10 Q. In general, for what purpose were you
11 preparing valuations for these companies?

12 A. Usually to -- you know, usually in
13 anticipation of a transaction, so a sale of the
14 company; in anticipation of a buy-sell agreement,
15 a buy-out of the company; sometimes it's an annual
16 requirement; and we do it for 409(a) -- IRC 409(a)
17 requirements for options, phantom stock plans,
18 stock appreciation right plans, stock grants,
19 things like that.

20 Q. In preparing your report and formulating
21 your opinions in this case, sir, did you bring to
22 bear any of that experience in attempting an
23 independent valuation based on historical data
24 available on the record of Antioch's value in the

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1 2003 time frame?

2 A. That's a fairly complex question.

3 Q. Thank you.

4 A. I bring a fair amount of my expertise in
5 valuation to what I -- what I -- what my opinion
6 was on the one hand, but did I do an actual
7 valuation --

8 Q. Yes, sir.

9 A. -- if that's what you're asking --

10 Q. That's what I'm asking.

11 A. -- the answer is no.

12 Q. Did you bring to bear your prior
13 experience to attempt an independent valuation of
14 The Antioch Company in the 2007/2008 time frame in
15 conjunction with preparing your report or
16 formulating your opinions in this case?

17 A. You'll have to repeat the question. I'm
18 sorry.

19 MR. SCHEIER: Can you read it back,
20 please, Kelly, when you get a chance?

21 (The question was read back.)

22 A. The -- the broad answer is we didn't do
23 -- I didn't do a valuation of The Antioch Company
24 in preparation of this report.

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1 Q. In one of your prior answers, you
2 mentioned that you've developed valuation models?

3 A. Mm-hmm.

4 Q. Is that your own model that you
5 developed?

6 A. The model is -- we use several models,
7 but the model is not idiosyncratically mine. It's
8 the -- we use Gordon Growth Models and Capital
9 Asset Pricing Models, which are fairly standard
10 valuation models that are used in the -- in the --
11 you know, from professional valuers.

12 In fact, Prairie Capital and BVI use
13 very similar methods. There's little differences
14 in how some of the calculations are approached,
15 but the same concepts are there. It's discounted
16 cash flow. You're capitalizing present values of
17 discounted cash flow and residual and terminal
18 values.

19 Q. You didn't use any of that modeling to
20 do independent valuations of Antioch at any time
21 in conjunction with your expert engagement
22 here; is that correct?

23 A. That's correct.

24 Q. Have you ever published any articles

24 (Pages 90 to 93)

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1 (The previous few questions and answers
2 were read back.

3 Q. (By Mr. Scheier) Then putting aside the
4 \$63 million verbal offer from Sun that you
5 reference that's no longer a part of your analysis
6 and focusing on the \$54 million letter of intent
7 from J.H. Whitney, did you review the J.H. Whitney
8 letter of intent in preparing this report and in
9 formulating your opinions?

10 A. I did. I read it.

11 Q. Did you recognize that the \$54 million
12 price that Whitney had stated in that letter of
13 intent was contingent on additional due diligence
14 by Whitney and ultimately the closing of a
15 definitive agreement?

16 A. Yes, which is -- which is more than
17 customary.

18 Q. And you don't know one way or the
19 other -- if the board of directors accepted that
20 offer -- that the company would actually realize
21 the \$54 million amount of consideration that is
22 set forth in Whitney's letter of intent, correct?

23 A. There's no way to know that.

24 Q. And there's certainly no evidence on

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1 this record to venture a guess?

2 A. They did substantial due diligence. If
3 it went into an APA into a 363, it would have been
4 a guaranteed bid.

5 Q. But that never --

6 A. The worst --

7 Q. Go ahead.

8 A. The worst it would have been would have
9 been \$54 million if there wasn't anybody else
10 stepping up to the option of the 363 sale, so...

11 Q. Although J.H. Whitney never, by way of
12 definitive agreement, agreed to pay \$54 million
13 because it never actually completed its due
14 diligence, correct?

15 A. It had done a fair amount of due
16 diligence ahead of that, but...

17 Q. Did you see any evidence that they
18 completed their due diligence and --

19 A. There's -- there's --

20 Q. -- and set on the \$54 million price?

21 A. There's no way to know that that would
22 be the final price.

23 Q. Let's look at the number you have at the
24 other end of your calculation. That's a CRG

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1 estimated value at 31 to 38 million dollars that
2 appears in your report and that you rely upon. Do
3 you know the purpose that CRG prepared that
4 estimate of company value?

5 A. Well, it's part of the -- part of the --
6 part of the -- part of the -- that requirement for
7 that bankruptcy filing, so...

8 Q. Did you review any of CRG's work
9 underlying its value estimate?

10 A. I didn't.

11 Q. Did you review any of CRG's underlying
12 work papers?

13 A. I didn't.

14 Q. Did you review the models that it
15 prepared in coming up with that number?

16 A. No, just that I knew it was relatively
17 consistent to everything else we'd seen.

18 Q. Did you review any of CRG's assumptions
19 that it used in coming up with --

20 A. I didn't.

21 Q. -- that value number?

22 A. No.

23 Q. Did you review any of the underlying
24 corporate financial reporting that CRG relied upon

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1 in coming up with its value estimate in the
2 disclosure statement?

3 A. I'm certainly aware of where things were
4 financially and what the statements look like; but
5 did I look at their actual analysis, the answer's
6 no.

7 Q. Do you know what documents they
8 considered?

9 A. I don't, no, because I didn't see their
10 analysis.

11 Q. Did you review any of the underlying
12 corporate forecasting that CRG relied upon in
13 estimating the value of the business?

14 A. I didn't see the actual forecasting,
15 just the comments about their forecasts.

16 Q. And whose comments were those?

17 A. Oh, I think I knew there was -- they
18 were estimating a 7-1/2 percent decline, and I
19 can't remember exactly where, but it was somewhere
20 in the -- in the -- after the Whitney offer went
21 down, there was a report from Houlihan back to the
22 -- to the -- to the lenders, the senior lenders,
23 who were being asked to be reviewed -- asking for
24 a review of what the current activity was, and

75 (Pages 294 to 297)